

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

COMPLAINT FOR DECLARATORY JUDGMENT

The plaintiff, BBC Chartering & Logistic GmbH & Co. KG (“BBC”), files this *Complaint for Declaratory Judgment* and respectfully represents as follows:

I.

BBC requests that this Court declare the rights, liabilities, and other legal relationships under a contract for the carriage of goods by sea, and to determine rights arising under that contract.

II.

On information and belief, the defendants, Finning Chile S.A. (“Finning”), Caterpillar Americas S.A.R.L. (Caterpillar), and WE Cox Claims Group (USA) LLC (“WECCG”), are entities that would be affected by this declaration.

III.

BBC is a foreign corporation organized and existing under the laws of a foreign nation, with its principal offices in Leer, Germany, and which was and is engaged in the business of operating vessels for the carriage of goods by sea. Specific to this action, BBC was the COGSA carrier in relation to certain cargo shipped onboard the M/V BBC STEINHOEFT.

IV.

On information and belief, Finning is a foreign corporation organized and existing under the laws of a state other than Texas, and is doing business within this district. Furthermore, Finning is a party to the contract of affreightment evidenced by the bill of lading more fully described herein, under which certain cargo was shipped from Houston, Texas, to Valparaiso, Chile. Specifically, Finning was the named consignee, and on information and belief, the buyer/owner of the cargo allegedly damaged during shipment onboard the BBC STEINHOEFT.

V.

On information and belief, Caterpillar is a foreign corporation organized and existing under the laws of a state other than Texas, and is doing business within this district. Furthermore, Caterpillar is a party to the contract of affreightment evidenced by the bill of lading more fully described herein, under which certain cargo was shipped from Houston, Texas, to Valparaiso, Chile. Specifically, Caterpillar was the named shipper, and on information and belief, the seller/owner of the cargo allegedly damaged during shipment onboard the BBC STEINHOEFT.

VI.

On information and belief, WECCG is a foreign corporation organized and existing under the laws of a state other than Texas. As it relates to this action, and on information and belief, WECCG is the assignee and/or designated recovery agent of Finning and/or Caterpillar's claims

arising out of the cargo damage alleged to have occurred during shipment onboard the BBC STEINHOEFT.

VII.

This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure, and this Court has jurisdiction over this action under 28 U.S.C. § 1333, as this is a claim that arises under the Court's admiralty and maritime jurisdiction. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2), as a substantial portion of the events giving rise to this claim occurred within this district.

VIII.

Goods consigned to Finning and said to be eight pieces, including the two "gen sets" or generators that were allegedly damaged (the "Cargo"), were loaded aboard the BBC STEINHOEFT in Houston, Texas, on or about January 26, 2013. At that time BBC issued Bill of Lading No. HOUVALP0413-006 for the Cargo, which constitutes the contract of carriage (the "Bill of Lading").

IX.

The Bill of Lading, including the terms and conditions found on Page 2, provide in relevant part as follows:

PARTICULARS DECLARED BY THE SHIPPER BUT NOT
ACKNOWLEDGED BY THE CARRIER

Number and kind of packages; description of cargo
SAID TO BE

8 PIECES 2 SKID GEN & ENG C-175-10
PACKAGE GEN SET
S/N: CATC1751LWYB01192
S/N: CATC1751KWYB01203
4 BOXES LOOSE PARTS
2 BOXES RADIATORS

* * *

Special Clauses

B. U.S. Trade Period of Responsibility

(i) In case the contract evidenced by this bill of lading is subject to the U.S. Carriage of Goods by Sea Act of the United States of America 1936 (U.S. COSGA), then the provisions stated in said act shall govern before loading, and after discharge and throughout the entire time the cargo is in the carrier's custody and in which event freight shall be payable on the cargo coming into the Carrier's custody. For U.S. trades, the terms on file with the U.S. Federal Maritime Commission shall apply to such shipments. In the event that U.S. COGSA applies, then the Carrier may, at the Carrier's election, commence suit in a court of proper jurisdiction in the United States in which case this court shall have exclusive jurisdiction.

(ii) If the U.S. COGSA applies, and unless the nature and value of the cargo has been declared by the shipper before the cargo has been handed over to the carrier and inserted in this Bill of Lading, the Carrier shall in no event be or become liable for any loss or damage to the cargo in any amount exceeding USD500 per package or customary freight unit. If, despite the provisions of 3(a), the Carrier is found to be liable for deck cargo, then all limitations and defenses available under US COGSA (or other applicable regime) shall apply and suit may be brought by the Carrier at the Carrier's election in the U.S. District Court of proper jurisdiction.

X.

Although BBC provided a fair opportunity to declare a value for the Cargo, including providing space for this on the face of the Bill of Lading, no value was declared.

XI.

The Cargo was delivered to a fit and customary wharf and/or in accordance with port custom in Valparaiso on or about March 8, 2013, in good condition. Finning and/or its authorized representative removed and took custody and possession of the Cargo on or about March 10, 2013, transporting the Cargo overland from Valparaiso to Quintero, Chile. Finning

did not timely tender a notice setting forth the general nature of the alleged damage to the Cargo, and BBC is therefore entitled to a presumption that the Cargo was delivered in good order.

XII.

The defendant(s) have wrongfully alleged liability on the part of BBC for damage to the Cargo. Accordingly, BBC and the defendants are entities interested under the contract for carriage within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

XIII.

As an ocean carrier under COGSA, 46 U.S.C. § 30701, *et seq.*, BBC is not liable for loss to cargo occurring when such cargo is not within BBC's custody. Here, any damage to the cargo shipped pursuant to the Bill of Lading occurred after it had been delivered to the consignee's custody at the port of discharge. BBC is therefore not liable for any damages to the Cargo. The alleged damages and BBC's liability are therefore expressly denied.

XIV.

As an ocean carrier under COGSA, 46 U.S.C. § 30701, *et seq.*, BBC is not liable for loss to cargo resulting from excepted causes. Here, if there was any damage to the Cargo shipped pursuant to the Bill of Lading, it was exclusively caused by one or more excepted causes, including, but not limited to, an error in navigation and/or management of the BBC STEINHOEFT, peril(s) of the sea, an act of God, and/or damage occurring without fault of the carrier. BBC is therefore not liable for any alleged loss or damage to the Cargo.

XV.

Any and all alleged liability on the part of BBC is specifically denied. Even assuming, however, that BBC is responsible for any damage and/or loss of the Cargo, such damage and/or

loss is subject to the U.S. COGSA's limitations, including, but not limited to, the \$500.00 per package limitation.

WHEREFORE, the complainant, BBC Chartering & Logistic GmbH & Co. KG, prays that the defendants, Fining Chile S.A., Caterpillar Americas S.A.R.L., and WE Cox Claims Group (USA) LLC, be cited and served, and that after all legal delays and proceedings, this Court declare that:

That BBC is not liable for any loss and/or damage to the Cargo since any damage occurred after it was no longer in BBC's custody as carrier and/or while it was in the custody of a third-party following delivery.

In the alternative, the exceptions provided for by COGSA are a complete liability shield preventing any recovery by the defendants from BBC for the alleged loss and/or damage to the Cargo.

In the further alternative, the limitation of liability provisions in COGSA apply to the contract of carriage, thus limiting any potential recovery of the defendants from BBC to \$500.00 per package for the alleged loss and/or damage to the cargo.

In the further alternative, that BBC is entitled to the benefits of the Limitation of Liability Act, 46 U.S.C. § 30501, *et seq.*, as the alleged loss and/or damage to the Cargo, if any, occurred without BBC's privity or knowledge.

BBC further prays for all general and equitable relief to which it may be entitled.

Respectfully submitted,

/s/ Frederick W. Swaim III

Jason P. Waguespack, T.A.

Federal I.D. No. 268357

Frederick W. Swaim III

Federal I.D. No. 412753

GALLOWAY, JOHNSON, TOMPKINS,
BURR & SMITH

One Shell Square, 40th Floor

701 Poydras Street

New Orleans, Louisiana 70139

Telephone: (504) 525-6802

Telecopier: (713) 525-2456

Email: jwaguespack@gjtbs.com

fswaim@gjtbs.com

OF COUNSEL:

Nathan G. Orf

GALLOWAY, JOHNSON, TOMPKINS,

BURR & SMITH

701 Poydras Street, 40th Floor

New Orleans, Louisiana 70139

Telephone: (504) 525-6802

Telecopier: (504) 525-2456

Email: norf@gjtbs.com

ATTORNEYS FOR THE PLAINTIFF

BBC CHARTERING & LOGISTIC GmbH & CO. KG